Rule 6, Ariz. R. Crim. Proc.

**RIGHT TO COUNSEL – *Miranda* – Fifth Amendment right to counsel……
……Revised 1/2010**

The Fifth Amendment guarantees that "[n]o person … shall be compelled in any criminal case to be a witness against himself." In *Brown v. U.S.*, 356 U.S. 148, 155-56 (1958), a pre-*Miranda* case, the United States Supreme Court referred to the Fifth Amendment as "a humane safeguard against judicially coerced self-disclosure."

In *Miranda v. Arizona,* 384 U.S. 436, 465 (1966), the Court described the Fifth Amendment right to counsel as "a protective device to dispel the compelling atmosphere of the interrogation." The *Miranda* Court reasoned that unless a defendant held in government custody for interrogation has a right to have an attorney present, his ability "to exercise the privilege – to remain silent if he chose or to speak without any intimidation, blatant or subtle" – would be undermined. *Id*. at 466. *See generally State v. Hitch*, 160 Ariz. 297, 772 P.2d 1150 (App. 1989). Confessions resulting from custodial interrogation are presumed to be involuntary and the State must establish by a preponderance of the evidence that the confession was voluntary. *State v. Jimenez*, 165 Ariz. 444, 448-449, 799 P.2d 785, 789–790 (1990); *In re Andre M.*, 207 Ariz. 482, 484, ¶ 8, 88 P.3d 552, 554 (2004).

As the United States Supreme Court stated in *Colorado v. Connelly*, 479 U.S. 157, 170 (1986), "The sole concern of the Fifth Amendment, on which

Miranda was based, is governmental coercion." Thus, the "voluntariness of a waiver … has always depended on the absence of police overreaching" and not upon a metaphysical inquiry into a defendant's "free will" or his subjective perceptions of reality. *Id*.

The Fifth Amendment right to counsel applies only to **custodial interrogation** in criminal cases. As the Arizona Court of Appeals said in *In re Timothy C*., 194 Ariz. 159, 162, ¶ 11, 978 P.2d 644, 647 (App. 1998), "In *Miranda v. Arizona*, the Supreme Court held that the Fifth Amendment privilege against compulsory self-incrimination applies in custodial interrogations and is binding on all states." [Citation omitted.] Thus, *Miranda* rights are based upon the Fifth Amendment.

After police have a suspect in custody for any offense and before questioning him, the police must inform the suspect of his right to consult with an attorney and to have an attorney present during interrogation. *Miranda v. Arizona,* 384 U.S. 436, 469-473 (1966). The Fifth Amendment right to counsel is **not offense-specific** – that is, it does not matter why the defendant is in custody or whether the police are questioning the defendant about any specific offense. Invoking one's *Miranda* rights expresses a "desire to deal with the police only through counsel." *Edwards v. Arizona,* 451 U.S. 477, 484 (1981). Thus, once a person in custody requests the presence of counsel, the police may not question that individual about **any** offense. To put it another way, the Fifth Amendment

privilege is **not** limited to questioning about the crime for which the person is in custody. *Arizona v. Roberson,* 486 U.S. 675, 687 (1988).

The Fifth Amendment right to counsel also attaches as soon as a suspect is in custody, whether or not any "adversarial relationship" procedures have begun. *McNeil v. Wisconsin,* 501 U.S. 171**,** 178 (1991).

Invoking one's right to counsel under the Sixth Amendment does not automatically imply asserting one's right to counsel under the Fifth Amendment, and vice versa. An accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding does not constitute an invocation of the Fifth Amendment right to counsel, which is separately derived from the Fifth Amendment's guarantee against compelled self-incrimination. In *McNeil v. Wisconsin,* 501 U.S. 171 (1991), the defendant was charged with an armed robbery and jailed for that charge. He invoked his right to counsel in the judicial proceedings on the robbery. While he was in jail on the robbery charge, police suspected that he was involved in a murder and related crimes. The police came to the jail and read him his *Miranda* rights and, after he waived them, they questioned him about the murder offenses. The defendant admitted those offenses, and, based on those admissions, the defendant was charged with the murder and related crimes. He moved to suppress the statements, arguing that his invocation of the Sixth Amendment right to counsel in the robbery case "constituted an invocation of the [Fifth Amendment] *Miranda* right to counsel, and that any subsequent waiver of that [Fifth Amendment] right during police-initiated

questioning regarding *any* offense was invalid." *Id*. at 174 [emphasis in original]. The United States Supreme Court disagreed, stating that the Sixth Amendment right to counsel is "offense specific" and "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced." *Id*. at 175. The Court concluded that because the defendant waived his Fifth Amendment *Miranda* rights and confessed the murder offenses to police before his Sixth Amendment right to counsel on those offenses had even attached, his statements were admissible on those offenses. *Id*. at 176.

However, note that *Miranda* warnings are sufficient to make a defendant aware of the consequences of a decision to waive his Sixth Amendment rights during postindictment questioning. "By knowing what could be done with any statements he might make, and therefore, what benefit could be obtained by having the aid of counsel while making such statements, petitioner was essentially informed of the possible consequences of going without counsel during questioning." *Patterson v. Illinois*, 487 U.S. 285, 294 (1988),

There must be **both** a custodial setting and official interrogation to trigger the *Miranda* right to counsel. Hence, if either of those elements is not present, the right to counsel under *Miranda* is not activated. *See Miranda*, 384 U.S. at 477-78; *United States v. Mesa,* 638 F.2d 582, 584-85 (3rd Cir. 1980); *see also Illinois v. Perkins*, 496 U.S. 292, 297 (1990). A "conversation initiated voluntarily by a defendant does not constitute 'custodial interrogation,' and a spontaneous statement not made in response to interrogation does not violate *Miranda.*" *State*

v. Valencia, 186 Ariz. 493, 502, 924 P.2d 497, 506 (App. 1996), *internal citations omitted*.

Both custody and interrogation are required for *Miranda* to apply. Thus, statements that are not made in response to interrogation are admissible even if the suspect is in custody when he makes the statements. In *State v. Smith,* 193 Ariz. 452, 974 P.2d 431 (1999), Smith was arrested for murdering an elderly couple. An officer held Smith in an unsecured holding room while waiting for a detective to arrive to question Smith. While the officer and Smith waited for the detective, they engaged in small talk about Colorado and hunting. *Id*. at 458, ¶ 19, 974 P.2d at 437. During this conversation, the officer remarked that Smith "did not look well for his age and that such an appearance is usually caused by sickness or drug use. Smith said he was not an addict just because he had some methamphetamine," *Id*. The officer responded, "What meth?" and Smith then produced some methamphetamine from his pocket. *Id*. Smith was convicted. On appeal, he argued that the statements should have been suppressed because when he made the statements, he was in custody and had not yet been advised of his *Miranda* rights. The Arizona Supreme Court rejected Smith's argument, stating that the officer did not need to give Smith his *Miranda* rights before talking to Smith "because he had no intention of conducting an interrogation." *Id*. *at* ¶20.

To invoke his *Miranda* rights, a suspect must verbally state his wish for assistance of counsel to be present during a custodial interrogation or, at least, must make a statement that can be construed as wanting counsel to be present.

Edwards v. Arizona, 451 U.S. 477, 484 (1981); *Davis v. United States*, 512 U.S. 452, 459 (1994). "[T]o find that [the defendant] invoked his Fifth Amendment right to counsel on the present charges merely by requesting the appointment of counsel at his arraignment on the unrelated charge is to disregard the ordinary meaning of that request." *State v. Stewart,* 113 Wash. 2d 462, 471, 780 P.2d 844, 849 (1989). An attorney's request to be present at future "interviews" does not trigger *Edwards*. *U.S. v. Wright,* 962 F.2d 953**,** 956 (9th Cir. 1992).

Once a suspect invokes his Fifth Amendment right to counsel – which he may do at any point, even before the police administer the *Miranda* warnings – the interrogation must immediately cease until counsel has been made available. However, the suspect cannot enter a valid waiver of his *Miranda* rights until after he has been warned of those rights. A valid waiver of those rights must be knowing and voluntary, in complete understanding of what the waiver means. *Edwards v. Arizona,* 451 U.S. 477 (1981). Nevertheless, an exception arises if the subject initiates further communication and indicates that he wants to communicate further. In that situation, the police may resume questioning.

It is important to distinguish between voluntariness questions and *Miranda* violation issues. A statement obtained in violation of a suspect's *Miranda* rights is inadmissible in the State's case in chief. Nevertheless, if the defendant's statement, though taken in violation of *Miranda*, was made voluntarily, the statement may used to impeach the defendant's testimony should he choose to testify at trial. *Harris v. New York*, 401 U.S. 222, 226 (1971); *State v. Huerstel*,

206 Ariz. 93, 107, ¶ 61, 75 P.3d 698, 712 (2003); *State v. Walker*, 138 Ariz. 491, 495, 675 P.2d 1310, 1314 (1984).

Voluntariness and *Miranda* violations are two separate inquiries. *State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983); *In re Jorge D*., 202 Ariz. 277, 281, ¶ 19, 43 P.3d 605, 609 (App. 2002). *Miranda* warnings relate to the admissibility of a confession based upon a defendant's being apprised of his right to counsel and waiving that right – not to its voluntariness. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Montes*, 136 Ariz. at 494, 667 P.2d at 194. *State v. Tapia,* 159 Ariz. 284, 286, 767 P.2d 5, 7 (1988); *accord, State v. Pettit*, 194 Ariz. 192, 196. 979 P.2d 5, 9 (App. 1998). "To satisfy *Miranda*, the State must show that appellant understood his rights and intelligently and knowingly relinquished those rights before custodial interrogation began." *State v*. *Tapia*, 159 Ariz. at 286-87, 767 P.2d at 7-8*, citing State v. Rivera,* 152 Ariz. 507, 513, 733 P.2d 1090, 1096 (1987).